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In The
Supreme Court of the United States

PAUL HENDLEY and the
CITY OF WAUKEGAN,

Petitioners,

v.

S. ALEJANDRO DOMINGUEZ,

Respondent.

On Joint Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a plaintiff's general verdict may be properly affirmed on appeal when the reviewing court has, contrary to the *Baldwin* principle, found that some, though not all, of the theories of recovery submitted to the jury are supported by the law and the evidentiary record?

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, petitioners state that they have no parent companies or subsidiaries.

PARTIES TO THE PROCEEDINGS

The parties named in the caption are the parties to this proceeding.

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OPINIONS BELOW

The September 30, 2008 opinion of the United States Court of Appeals for the Seventh Circuit is reported at 545 F.3d 585 (7th Cir. 2008) (App. at 1-18). On May 30, 2008, the Seventh Circuit granted the parties leave to address certain cases that relate to the standard of review applicable to the general verdict issued below (App. at 26).

Judgment was entered in favor of plaintiff S. Alejandro Dominguez ("Dominguez") and against defendant Paul Hendley ("Hendley") on October 17, 2006 (App. at 19). Hendley's post-trial motions were denied on December 4, 2006 (App. at 20-21). A new judgment order was entered against Hendley and the City of Waukegan ("Waukegan") on December 13, 2006 (App. at 22-25). Hendley and Waukegan's joint petition for panel rehearing was denied on October 31, 2008 (App. at 27).

JURISDICTION

The Seventh Circuit's opinion was rendered on September 30, 2008. As stated above, Petitioners' petition for panel rehearing was denied on October 31, 2008. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATEMENT

A. Overview

On October 17, 2006, a jury returned a $9,063,000 general verdict in favor of Dominguez and against retired police officer Hendley. After the district court denied Hendley's post-trial motions, a judgment in that amount was entered against Hendley and his former employer, the City of Waukegan.

On appeal, Hendley and Waukegan ("Petitioners") sought to show the United States Court of Appeals for the Seventh Circuit that one of the eleven theories of recovery Dominguez presented to the jury was legally invalid and that one or more of the other ten theories lacked evidentiary support. Petitioners explained that, under the "*Baldwin* principle," named after *Maryland v. Baldwin*, 112 U.S. 490 (1884) and its progeny, a general verdict (whether it be in favor of the plaintiff or the defense) must be reversed whenever an appellant demonstrates that a liability or defense theory that lacks evidentiary or legal support was improperly submitted to a jury. Even though the *Baldwin* principle has been applied by the United States Supreme Court for over 100 years, the Seventh Circuit refused to apply it in this case and, instead, affirmed the district court's judgment because it believed that at least three of Dominguez's eleven liability theories were properly submitted to the jury.

This Court should review the Seventh Circuit's opinion in this case and clarify the standard by which general verdicts issued in civil cases should be reviewed. The Seventh Circuit and many of the other federal circuits have issued opinions that apply tests, including the "harmless error" test, that conflict with the *Baldwin* line of authority. Some Seventh Circuit cases have even gone so far as to require appellants to disprove every theory submitted by the successful litigant in order to obtain reversal of a general verdict. Conflicts regarding the appropriate standard of review for general verdicts exist amongst, between and even inside the circuits. Supreme Court review of this important, recurring issue will assist the federal circuit courts, who are regularly asked to review general verdicts in civil cases, as well as civil litigants, federal trial courts and state courts that look to Supreme Court precedent for guidance.

B. The Events Leading To Dominguez's Section 1983 Lawsuit

On September 19, 1989, Lisa Kraus ("Kraus") checked into the Naval Hospital in Great Lakes, Illinois and reported that three males had broken into her apartment earlier that day and that one of the males raped her. After hospital personnel examined Kraus and prepared a standard sexual assault kit, the investigation of the alleged rape was turned over to the Waukegan, Illinois Police Department (the "WPD").

On September 21, 1989, while Hendley and his partner John Moran ("Moran") were at the apartment complex where both Kraus and the rape suspect were reported to live, a security guard for the complex told Hendley that he had information indicating that Dominguez had raped Kraus. Later that day, while Hendley was talking to Dominguez inside the security guard's office, Kraus and Moran entered the apartment building and Kraus identified Dominguez as the person who had raped her two days earlier. Dominguez was arrested and indicted on two counts of aggravated sexual assault and one count of home invasion. On February 28, 1990, after a three-day bench trial, Dominguez was convicted. His conviction was affirmed on appeal and he was imprisoned for approximately four years.

After his release, a new test showed that Dominguez's DNA did not match the semen found on Kraus' underwear. His conviction was vacated on April 26, 2002 and, on April 23, 2004, he filed suit against Waukegan and a number of WPD officers, including Hendley, under 42 U.S.C. § 1983.

C. The Section 1983 Trial

Because all of the other officers named in Dominguez's § 1983 lawsuit died before trial, Hendley and Waukegan were the only defendants during the ten-day trial that took place between October 3 and 17, 2006. Before the jury was instructed, the trial judge ruled that Dominguez had failed to prove any

direct liability against Waukegan, leaving Hendley as the sole defendant.

The jury was instructed to find in favor of Dominguez if plaintiff had shown that Hendley caused his criminal trial to be unfair by (1) using an unnecessarily suggestive identification procedure to identify Dominguez as Kraus' attacker or (2) withholding material evidence pointing to Dominguez's innocence or (3) fabricating evidence against Dominguez. During the trial, Dominguez asserted nine distinct factual theories that, according to him, would support a finding that Hendley violated *Brady v. Maryland*, 373 U.S. 83 (1963) by withholding material, exculpatory evidence.

The jury returned a general verdict in favor of Dominguez in the amount of $9,063,000. Hendley's post-trial motions were denied on December 4, 2006 and an amended judgment order was entered against Hendley and Waukegan on December 13, 2006. Hendley and Waukegan appealed to the Seventh Circuit.

D. The Seventh Circuit Appeal

During the briefing before the Seventh Circuit, which included supplemental briefs from Dominguez and Petitioners regarding the standard of review for the jury's general verdict, Petitioners argued that (1) Dominguez had failed to produce any proof to support his claim that Hendley fabricated evidence; (2) Dominguez had failed to produce evidence to support

his argument to the jury that Hendley withheld nine distinct categories of evidence; and (3) Dominguez's theory that Hendley could be liable under § 1983 for conducting a "show up" identification procedure, even if there was no proof of post-arrest misconduct, should have been dismissed on statute of limitations and qualified immunity grounds. Petitioners also argued that, under the *Baldwin* principle, if Petitioners demonstrated that Dominguez's "show up" theory was deficient as a matter of law or that Dominguez's other ten liability theories were deficient due to a lack of evidentiary support, the district court's judgment should be reversed.

Although Dominguez argued in its response brief and supplemental memorandum that all of the theories it submitted to the jury were legally and factually supported, he also argued for a standard of review that is the exact reverse of the *Baldwin* principle. Dominguez argued that "when a jury returns a general verdict, this Court must affirm if the verdict finds support in any of the theories presented at trial." While Dominguez cited Seventh Circuit cases to support his position and attempted to distinguish the circuit-level cases cited by Petitioners, Dominguez failed to cite *Baldwin* or any of the other United States Supreme Court cases that have followed *Baldwin*.

The Seventh Circuit issued its opinion on September 30, 2008 affirming the judgment of the district court. *Dominguez v. Hendley*, 545 F.3d 585 (7th Cir. 2008). On October 14, 2008, Petitioners filed a

petition for rehearing arguing that the Seventh Circuit had failed to cite or apply the *Baldwin* principle. Petitioners asserted that the Seventh Circuit's opinion improperly adopted the approach advocated by Dominguez and affirmed the trial court's judgment based on its finding that three of the eleven theories presented to the jury were legally and factually supported.

In their petition for rehearing, Petitioners argued that Dominguez had not, at any time during the appeal, pointed to a single piece of trial evidence to support his claim that Hendley fabricated evidence against him. Petitioners argued that rehearing was justified because the Seventh Circuit never addressed Dominguez's failure to support his fabrication theory. As Petitioners argued, the Seventh Circuit erroneously assumed that the general verdict could stand as long as the record provided support for some of Dominguez's trial theories.

Petitioners argued that the Seventh Circuit improperly affirmed the jury's general verdict based on its finding that two out of Dominguez's nine theories related to Hendley's alleged withholding of evidence were supported by the record. The Seventh Circuit stated that, because the record supported Dominguez's assertion regarding "Hendley's failure to disclose the showup and the Navy Report," and because Hendley was required to show that "no reasonable jury could have found by a preponderance that he withheld material exculpatory evidence,"

(App. at 9) the jury's general verdict would be affirmed.

Citing *Wilmington Star Mining Co. v. Fulton*, 205 U.S. 60, 78 (1907), which reversed a plaintiff's general verdict because three of the plaintiff's eight negligence theories were not supported by trial evidence, Petitioners argued that the general verdict could not be affirmed unless the record contained at least some evidentiary support for the other seven "withholding evidence" theories. Petitioners asserted, for instance, that although Dominguez's attorney made lengthy arguments to the jury about Hendley's alleged removal of vaginal swabs from the rape kit, the crime lab reports and the transcript from Dominguez's criminal trial conclusively showed that these swabs were tested and used as exhibits at Dominguez's trial. Petitioners provided other examples of Dominguez's failure to produce evidence to support all nine of his *Brady* claims.

In addition, Petitioners argued that the Seventh Circuit had misconstrued their statute of limitations and qualified immunity arguments regarding Dominguez's claim that Hendley could be held liable for conducting an improper "show up" identification even in the absence of post-arrest misconduct. Petitioners argued that the jury's general verdict could not be affirmed because this particular claim was not supported by the law. Although Petitioners cited other Supreme Court and circuit-level cases applying the *Baldwin* principle, and argued that these cases were inconsistent with the Seventh Circuit's opinion, the

Seventh Circuit nevertheless denied Petitioners' petition for panel rehearing on October 31, 2008.

REASONS FOR GRANTING THE PETITION

I. The Seventh Circuit Decision In This Case Is In Direct Conflict With Well-Established Supreme Court Precedent Under *Baldwin*.

The Seventh Circuit's opinion in this case is in direct conflict with the *Baldwin* principle, which requires evidentiary and legal support for any theory upon which a jury could have rendered a general verdict. The Seventh Circuit's error hinges on its belief that a reasonable jury "could have found" for Dominguez on one of the theories for which the Seventh Circuit found evidentiary support. The Seventh Circuit violated the *Baldwin* principle by affirming the general verdict rendered below based upon its review of only three out of the eleven theories Dominguez submitted to the jury.

Because a general verdict cannot be broken down into constituent parts, and there are no means by which to determine what facts or legal theories the jury applied, cases following the *Baldwin* principle recognize that, first, a general verdict does not create a presumption that the jury accepted all of the prevailing party's claims and arguments and, second, a reviewing court should not project its own impressions of the evidence on a general verdict. Rather,

when a reviewing court determines that an improper or unsupported claim or defense has been submitted to a jury, the case should be reversed and remanded. The United States Supreme Court has consistently applied the *Baldwin* principle in civil cases over the last 100 years.

Maryland v. Baldwin, 112 U.S. 490 (1884) was a case brought on behalf of Markley, who claimed that he had been improperly excluded from his share of the estate distribution of his alleged father. The defendants raised five distinct defense theories, or pleas, including their first defense, which was that Markley was not one of the heirs of the deceased and was not entitled to a distributive share. *Id.* at 493. After the jury entered a general verdict in favor of the defense, the case was brought before the United States Supreme Court on a writ of error, where the Court reversed and remanded for a new trial. The Court held that, because the trial court had improperly admitted hearsay in support of the defendants' first plea, the "generality [of the jury's verdict] prevents us from perceiving upon which plea they found . . . [and] the verdict cannot be upheld, for it may be that by that evidence the jury were controlled under the instruction given." *Id.* The Court concluded that, because it was "impossible to say what effect it [the improper hearsay evidence] may have had on the minds of the jury on the question of the marriage," the case would have to be remanded for a new trial. *Id.* at 494.

In *Wilmington Star Mining Co. v. Fulton*, 205 U.S. 60, 78-79 (1907), the Supreme Court followed

Baldwin and reversed a general verdict, this time entered in favor of a plaintiff, because three of the eight negligence theories asserted against the defendant were not supported by evidence. In this case, a widow claimed that eight specified acts of negligence committed by a mining company proximately caused the death of her husband. The Supreme Court held that there was no evidence introduced at trial tending to establish the commission of acts of negligence charged in the second, third and sixth counts of the plaintiff's declaration. *Id.* at 77-78. Citing *Baldwin*, the Court stated that, unlike a criminal case, a general verdict in a civil case cannot be sustained when one or more of the counts of the declaration "have not been supported by evidence, and where it is impossible from the record to say upon which of the counts of the declaration the verdict was based." *Id.* at 79. Together, *Baldwin* and *Wilmington Star* make it clear that the *Baldwin* principle is designed to provide equal protection to civil plaintiffs and defendants against whom a general verdict has been entered.

Every United States Supreme Court case that has revisited the issue has applied the *Baldwin* principle. In *United N.Y. & N.J. Sandy Hook Pilots Ass'n v. Halecki,* 358 U.S. 613 (1959), this Court reversed a plaintiff's general verdict where the case had been submitted to the jury on a strict liability theory of unseaworthiness and an alternative theory of negligence. The Court held that the plaintiff, the administrator of an estate, could not recover under the unseaworthiness doctrine because the deceased

had not been performing the type of work that would implicate liability under the doctrine. *Id.* at 618. The Court concluded that "a new trial will be required, for there is no way to know that the invalid claim of unseaworthiness was not the sole basis for the verdict." *Id.* at 619.

The Court reached the same result in *Sunkist Growers, Inc. v. Winckler & Smith Citrus Prod. Co.*, 370 U.S. 19 (1962), an anti-trust case where the defendant objected to the proposed jury instructions offered with respect to one of plaintiff's trial theories. The Supreme Court cited *Baldwin* and reversed, holding that "[s]ince we hold erroneous one theory of liability upon which the general verdict may have rested . . . it is unnecessary for us to explore the legality of the other theories." *Id.* at 29-30.

The Supreme Court also applied the *Baldwin* principle in *City of Columbia v. Omni Outdoor Advert., Inc.*, 499 U.S. 365, 384 (1991), reversing a plaintiff's general verdict because the verdict could have been premised upon alleged violations of federal anti-trust laws for which the defendants had immunity. Likewise, in *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 459 (1993), a disjunctively worded elements instruction (like the instruction presented in this case) was presented to the jury, stating that the defendants could be held liable under any one of three theories (monopolizing, attempting to monopolize or conspiring to monopolize). After the Supreme Court held that the jury had been improperly instructed with respect to the elements of proof for

"attempted monopolization," the Court cited *Sunkist*, reversed the general verdict and remanded, stating that "the jury's verdict did not negate the possibility that the § 2 verdict rested on the attempt to monopolize ground alone." *Id.* at 459.

The *Baldwin* line of Supreme Court authority therefore provides a bright line rule regarding the standard of review for general verdicts. If a jury enters a general verdict, and a reviewing court later determines that at least one of the liability or defense theories upon which the jury may have relied was either legally deficient or not supported by proper evidence, the general verdict must be reversed.

Rather than applying the *Baldwin* principle in this case and requiring evidentiary and legal support for each of the eleven theories Dominguez presented to the jury, the Seventh Circuit affirmed the district court's judgment and the jury's general verdict based upon its review of only three of these theories. Neither Dominguez nor the Seventh Circuit could point to a single piece of evidence supporting Dominguez's distinct claim that Hendley fabricated evidence that was used to convict Dominguez. The absence of evidence on this theory alone requires reversal of the jury's general verdict under *Baldwin*.

In addition, although the Seventh Circuit claimed to have found evidentiary support for two out of nine of Dominguez's theories regarding Hendley's alleged withholding of material, exculpatory evidence, neither the Seventh Circuit nor Dominguez identified

trial evidence to support the other seven theories. For instance, as the Petitioners argued in their petition for rehearing, even though Dominguez argued to the jury that Hendley caused Dominguez's conviction by stealing evidence from the rape kit, there is irrefutable evidence that the very items Dominguez claimed were missing from the rape kit were tested by the crime lab and presented as exhibits during his criminal trial.

The Seventh Circuit stated Hendley could only prevail on appeal if he showed that "no reasonable jury could have found by a preponderance of evidence that [Hendley] withheld material exculpatory evidence." (App. at 9). The Seventh Circuit affirmed based on its belief that the record supported Dominguez's claim that Hendley withheld information about the alleged "show up" identification and a Navy Report. But the Court's ruling stands *Baldwin* on its head. Although the jury "could have found" for Dominguez on these two theories, this does not relieve the court of appeals of its duty to review the other seven theories. Petitioners presented arguments which show that these other theories lacked evidentiary support.

The Supreme Court has been very clear that a reviewing court cannot affirm a general verdict based upon the mere possibility the jury relied upon a valid theory when it is also possible the jury relied upon an invalid theory. The Seventh Circuit affirmed the general verdict in this case because that verdict "could have" been based on a valid theory of recovery.

This ruling should be reversed and the matter should be remanded to the Seventh Circuit for further review consistent with *Baldwin*.

II. The Seventh Circuit Has Taken Three Conflicting Approaches In Its Review Of General Verdicts.

This case is not an isolated incident. Although the Seventh Circuit has, at times, applied the *Baldwin* principle properly, the case law demonstrates that the Seventh Circuit has taken at least three different approaches in its review of general verdicts. The Seventh Circuit has either: (1) applied *Baldwin*; (2) completely ignored *Baldwin*; or (3) created a "harmless error" exception to *Baldwin*. This case presents an opportunity for this Court to clarify the law and resolve the internally inconsistent approaches applied by the Seventh Circuit.

The Seventh Circuit has, at times, applied the *Baldwin* principle correctly. In *Lawndale Natl. Bank v. Am. Cas. Co.*, 489 F.2d 1384 (7th Cir. 1973), for instance, the Seventh Circuit cited *Baldwin* and *Sunkist* and reversed a general defense verdict. The court stated that because it "is impossible to say whether the verdict was based on the misrepresentation defense that should have been stricken or the arson defense that was properly submitted to the jury" it could not "without invading the province of the jury, decide that the evidence of arson justifies the verdict for American Casualty." *Id.* at 1388-89. *See*

also, Dawson v. New York Life Ins. Co., 135 F.3d 1158, 1165 (7th Cir. 1998) (applying *Baldwin* and holding that an incorrect instruction regarding one theory calls for a new trial even if the jury could have based its verdict on a different, properly instructed theory); *Saturday Evening Post Co. v. Rumbleseat Press, Inc.*, 816 F.2d 1191, 1197 (7th Cir. 1987) (when a jury is given a mixture of proper and improper instructions, its verdict must be set aside, even if it may have been based on a theory on which the jury was properly instructed).

In other instances like this case, the Seventh Circuit has outright ignored *Baldwin*, applying standards of review that are in direct conflict. For instance, in *McGrath v. Zenith Radio Corp.*, 651 F.2d 458 (7th Cir. 1981), the plaintiff brought claims for breach of contract, fraud and violations of the securities laws against his former employer in conjunction with his termination and the jury issued a general verdict. *Id.* at 461. The Seventh Circuit stated that "to triumph on appeal, defendants must show that under none of the three rationales was the plaintiff entitled to the award of compensatory and punitive damages." *Id.* at 464. The standard articulated in *McGrath* actually inverts the *Baldwin* principle by requiring an appellant to disprove every one of the appellee's trial theories in order to obtain reversal.

Likewise, in *Culli v. Marathon Petroleum Co.*, 862 F.2d 119 (7th Cir. 1988), the court held that because "plaintiffs could have succeeded under one of two alternative independent theories of relief, and the

jury returned a general verdict as opposed to a special verdict which, for example, could have included specific findings with respect to each theory of relief, we need only find that there was substantial evidence to support the jury's verdict under at least one of the two alternative theories." *Id.* at 123. In *Kossman v. N.E. Illinois Regl. Commuter R.R. Corp.*, 211 F.3d 1031 (7th Cir. 2000), the Seventh Circuit again ignored *Baldwin* and upheld a general verdict, ruling that even if some of the issues presented to the jury were insufficient, the defendant failed to request a special verdict or a general verdict with answers to written interrogatories. *Id.* at 1037. The court further held that "when a jury only returns a general verdict, we need only find support in the record for one of the theories presented to the jury in order to affirm the jury award." *Id.*

The Seventh Circuit has also applied a "harmless error" exception to *Baldwin*. For example, in *Collum v. Butler*, 421 F.2d 1257 (7th Cir. 1970), the plaintiff brought a Section 1983 action to recover damages for police brutality. The trial judge instructed the jury that the plaintiff could recover if the defendants unlawfully imposed corporal punishment, prevented the plaintiff from obtaining legal advice, or prevented the plaintiff from contacting his family or friends. *Id.* at 1260. The jury rendered a general verdict for the plaintiff. *Id.* at 1258. On appeal, the Seventh Circuit held the trial court erred by instructing the jury on plaintiff's last two claims. *Id.* at 1260. Despite the erroneous instruction, the Seventh Circuit affirmed,

stating that the two improper claims were insignificant to the trial. *Id.* The Seventh Circuit concluded that: "[t]o permit other issues which occupied positions of such relative insignificance in the trial to be treated now as so important as to make their submission to the jury prejudicial would not serve the interests of justice. Error must be viewed with respect to its relative effect on the results of trial." *Id.*

Again, in *Simmons v. Pinkerton's Inc.*, 762 F.2d 591 (7th Cir. 1985) the Seventh Circuit applied a harmless error exception. The court stated that, "in this case we are simply not persuaded by defendants' arguments that the erroneous instruction could have led to such profound confusion that the jury really might have based its decision on some theoretical, inapplicable breach of the Indiana Detective Law. We think we are entitled to have somewhat higher expectations of the jury." *Id.* at 599 n.3.

Many of the Seventh Circuit cases that fail to cite *Baldwin* and are in conflict with Supreme Court lack precedential lineage. *Kossman*, for instance, relied upon *Wassell v. Adams*, 865 F.2d 849, 855 (7th Cir. 1989) and *Culli*. *Kossman*, 211 F.3d at 1037. But *Wassell* does not directly support the holding in *Kossman* or create a defense obligation to propose a special verdict form. *Culli*, on the other hand, cites *Cannon Oil & Gas Well Serv., Inc. v. Evertson*, 836 F.2d 1252, 1254-55 (10th Cir. 1987), a Tenth Circuit case that provides no support for *Culli*'s holding and has nothing to do with the standard an appellant must meet to overturn a plaintiff's general verdict.

Culli, 862 F.2d at 123. The *McGrath* court cited no authority for the quote cited above.

The Seventh Circuit's approach to general verdicts should be reviewed because, by and large, Seventh Circuit law in this area is more internally inconsistent than the law in any other circuit. In addition, cases like *McGrath*, *Culli* and *Kossman* actually invert the *Baldwin* principle by requiring appellants to disprove every trial theory presented by the appellee in order to obtain reversal.

III. Other Circuits Review General Verdicts Under Tests That Directly Conflict With The *Baldwin* Principle.

Similar to the Seventh Circuit, the other circuit courts often ignore *Baldwin* and apply different standards for the review of general verdicts. For example, the Ninth Circuit has created a four-part test for the review of general verdicts that is in direct conflict with *Baldwin*. The First Circuit recently acknowledged that the Supreme Court has made "unequivocal pronouncements" regarding the application of the *Baldwin* principle in civil cases. Nevertheless, the First Circuit has, at other times, applied a "harmless error" exception to *Baldwin*. Similarly, the Fifth Circuit applies *Baldwin* correctly some of the time, but has also developed a "reasonably certain" standard to evaluate whether errors that underlie a general verdict are "harmless." There is conflict amongst the circuits and, just like the Seventh Circuit,

the precedent of many of the circuits is also internally inconsistent.

The First Circuit opinion in *Kerkhof v. MCI Worldcom, Inc.*, 282 F.3d 44 (1st Cir. 2002) highlights the division in authority that has developed amongst the circuits. Although the *Kerkhof* court recognized that "the general rule, adopted by this circuit, is that a new trial is usually warranted if evidence is insufficient with respect to any one of multiple claims covered by a general verdict," *Kerkhof,* 282 F.3d at 52, the court also stated that:

> Despite seemingly unequivocal pronouncements by the Supreme Court, the law in the circuits on this point is disparate. *Compare McGrath v. Zenith Radio Corp.*, 651 F.2d 458, 464 (7th Cir. 1981) (adopting the criminal rule in civil cases), with *Traver v. Meshriy*, 627 F.2d 934, 938-39 (9th Cir. 1980) (adopting a discretionary standard with multiple factors), and *McCord v. Maguire*, 873 F.2d 1271, 1273-74 (9th Cir.) (limiting *Traver* to situations where multiple claims are submitted for general verdict rather than those where a single claim is submitted based on multiple factual theories). Even in this circuit, although not on our facts, harmless error might resolve the issue. *See Brochu v. Ortho Pharm. Corp.*, 642 F.2d 652, 662 (1st Cir. 1981).

As indicated in *Kerkhof,* the First Circuit has applied *Baldwin* correctly in cases like *New York & Porto Rico S.S. Co. v. Garcia*, 16 F.2d 734, 737 (1st Cir. 1934),

but has also issued decisions like *Brochu v. Ortho Pharm. Corp.*, 642 F.2d 652, 662 (1st Cir. 1981) (applying the narrow "subset theory" of harmless error) and *Davis v. Rennie*, 264 F.3d 86, 105-10 (1st Cir. 2001) (applying the broader "reasonably certain" approach), which apply two distinct harmless error standards.

In another recent case, the First Circuit held that "[a]lthough not all circuits follow our practice, it does accord with the Supreme Court precedents that require remand in civil cases when one of several claims or theories encompassed in a general verdict was flawed (*e.g.*, because of a mistaken jury instruction)." *Gillespie v. Sears, Roebuck & Company*, 386 F.3d 21, 30 (1st Cir. 2004). In a footnote, the *Gillespie* court referred once again to the inter-circuit conflict regarding the standard of review for general verdicts as follows:

> *See, e.g., E. Trading Co. v. Refco, Inc.*, 229 F.3d 617, 621-22 (7th Cir. 2000) (requiring an affirmative showing that the jury "probably was confused" by being instructed on a claim or defense for which the party had presented no evidence). *Compare Traver v. Meshriy*, 627 F.2d 934, 938-39 (9th Cir. 1980) (adopting a four-factor discretionary standard) *with McCord v. Maguire*, 873 F.2d 1271, 1273-74 (9th Cir. 1989) (limiting *Traver* to general verdicts encompassing multiple legal theories and applying a new-trial rule for general verdicts based on a single legal theory encompassing multiple factual theories), *amended by* 885 F.2d 650 (9th Cir. 1989).

The Ninth Circuit has not only deviated from *Baldwin*, it has created its own unique test for reviewing general verdicts. In *Traver v. Meshriy*, 627 F.2d 934 (9th Cir. 1980), without even acknowledging Supreme Court cases applying the *Baldwin* principle, the Ninth Circuit announced the following four factor test for the review of general verdicts: (1) the potential for jury confusion that may have resulted from an erroneous submission of a particular claim; (2) whether privileges or defenses of the losing party apply to the count upon which the verdict is being sustained so that they would have been considered by the jury with reference to the count; (3) the strength of the evidence supporting the count being relied upon to sustain the verdict; and (4) the extent to which the same disputed issues of fact apply to one or more of the theories in question. *Id.* at 938-39.

Although subsequent Ninth Circuit panels have applied *Traver*, the case has also been criticized. In *Kern v. Levolor Lorentzen, Inc.*, 899 F.2d 772, 782 (9th Cir. 1990), Justice Kozinski argued in his dissenting opinion that the *Traver* approach "override[s] sub silentio a procedural rule four times stated by the United States Supreme Court in unequivocal terms . . . " Justice Kozinski criticized the Ninth Circuit's discretionary rule, observing that the "Court could not possibly have known if the verdict was based on due process [on which it affirmed the judgment], equal protection [the possibly erroneous theory], or both . . . [I]t simply relied on Traver without doing the analysis." *Id.* at 791.

The Fifth Circuit applied the *Baldwin* principle in *Nowell v. Universal Elec. Co.*, 792 F.2d 1310, 1312 (5th Cir. 1986), but it has also applied a "reasonably certain" standard in evaluating harmless error. In *Braun v. Flynt*, 731 F.2d 1205 (5th Cir. 1984), for instance, the Fifth Circuit upheld a general verdict despite an instruction authorizing recovery on either a false light theory (that was supported by evidence) or an appropriation theory (that was not). *Id.* at 1206. The court ruled that, because the entire focus of the plaintiff's case was her claim that the publication of an indecent photograph of her in Chic magazine placed her in a false light and damaged her reputation, the court was "totally satisfied, or, . . . 'reasonably certain'" that the jury had not based its verdict on the invalid claim. *Id. See also, Muth v. Ford Motor Co.*, 461 F.3d 557, 565 (5th Cir. 2006) (finding harmless error in jury instructions under the reasonably certain standard).

Although the Eighth Circuit applied *Baldwin* faithfully in *Dudley v. Dittmer*, 795 F.2d 669, 673-74 (8th Cir. 1986) and *Dakota Industries, Inc. v. Ever Best Ltd.*, 28 F.3d 910, 912 (8th Cir. 1994), that court has also recognized that, under a certain set of facts, it might apply a harmless error exception. For instance, in *Mueller v. Hubbard Milling Co.*, 573 F.2d 1029, 1039-40 (8th Cir. 1978), the Eighth Circuit analyzed the facts in that case under the harmless error exception, but stated that the facts did not justify application of the exception. Likewise, in *E.I. Du Pont De Nemours & Co. v. Berkley & Co.*, 620

F.2d 1247, 1258 n.8 (8th Cir. 1980), the Eighth Circuit stated that "[a] new trial will not result where it is reasonably certain that the jury was not significantly influenced by issues erroneously submitted to it" but also stated that "no such reasonable certainty is possible here."

The Third Circuit, which consistently applied *Baldwin* until 1999, *see, e.g., Albergo v. Reading Co.*, 372 F.2d 83, 85-86 (3d Cir. 1966), held in *Hurley v. Atlantic City Police Dept.*, 174 F.3d 95, 121-22 (3d Cir. 1999) that the harmless error exception applied where a jury returned a general verdict that encompassed an improper *quid pro quo* theory of sexual harassment. Likewise, while the Second Circuit applied the *Baldwin* principle in *Katara v. D.E. Jones Commodities, Inc.*, 835 F.2d 966, 971 (2d Cir. 1987), in *Bruneau v. S. Kortright Central School Dist.*, 163 F.3d 749, 759-60 (2d Cir. 1998), the court stated that the harmless error exception to *Baldwin* may be applied when the court is "sufficiently confident" that the verdict was not influenced by an error in the jury charge. *See also Morrisey v. National Maritime Union of Am.*, 544 F.2d 19, 27 (2d Cir. 1976) (recognizing harmless error exception to *Baldwin*).

The Tenth Circuit has also not applied *Baldwin* consistently. In *Asbill v. Housing Authority of Choctaw Nation*, 726 F.2d 1499, 1504 (10th Cir. 1984), the Tenth Circuit held that *Baldwin* and its progeny should not be read to require reversal in every case. The court stated that "[w]e note this holding [*Baldwin*] does not paint with as broad a brush as

appears from the language quoted. As with all errors committed at trial, a litmus test for reversal is whether the appellant was thereby unjustly prejudiced." *Id.*

It is therefore evident that the United States Courts of Appeals have inconsistently applied different standards of review for general verdicts in situations where one or more of the theories submitted to the jury at trial was presented in error. Some circuits have embraced *Baldwin*, some have ignored *Baldwin* altogether, and some have created their own exceptions not contemplated by the Supreme Court.

IV. Supreme Court Review Is Warranted Because This Is An Important, Recurring Issue And Because Others Have Called Upon This Court To Confirm The Continuing Application Of The *Baldwin* Principle.

Because the federal circuits are regularly asked to review general verdicts, and because it is not uncommon for a circuit court to find that one or more liability or defense theories submitted to a jury was presented in error, clarifying the standard of review for general verdicts warrants review by this Court. The conflict among the circuits and the need for Supreme Court intervention on this issue was highlighted by David M. Axelrad and Loren Kraus in *The Federal General Verdict Rule: Conflict in the Courts of Appeals*, 43 Fed. Law. 43, 43 (June 1996). *See also* Note, General Verdicts in Multi-Claim Litigation, 21 Mem. St. U. L. Rev. 705, 732 (1991). Additionally,

other petitions for certiorari have been filed by litigants seeking clarification regarding the continuing efficacy of the *Baldwin* principle. *See, e.g., Petition for a Writ of Certiorari, Transp. Ins. Brokers, Inc. v. D.W. Ferguson & Assoc.*, No. 94-2113, 1995 WL 17050048 (U.S. June 26, 1995), *cert. denied*, 516 U.S. 823; *Petition for a Writ of Certiorari, Ernst & Young LLP v. Knapp*, No. 96-886, 1996 WL 33421898 (U.S. Dec. 3, 1996), *cert. denied*, 519 U.S. 1112; *Petition for a Writ of Certiorari, The Atlantic City Police Dept. v. Hurley*, No. 99-431, 1999 WL 33633057 (U.S. Sept. 8, 1999), *cert. denied*, 528 U.S. 1074; *Petition for a Writ of Certiorari, Mitsubishi Elec. Corp. v. Ampex Corp.*, No. 99-1287, 2000 WL 34014313 (U.S. Jan. 31, 2000), *cert. denied*, 529 U.S. 1054.

CONCLUSION

For all of the foregoing reasons, this Petition For A Writ Of Certiorari should be granted.

Respectfully submitted,

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545 F.3d 585

United States Court of Appeals, Seventh Circuit.
S. Alejandro DOMINGUEZ, Plaintiff-Appellee,
v.
Paul HENDLEY and City of Waukegan,
Defendants-Appellants.
Nos. 07-1004, 07-1005, 07-3030.

Argued May 30, 2008.
Decided Sept. 30, 2008.
Rehearing Denied Oct. 31, 2008.

Jonathan I. Loevy (argued), Loevy & Loevy, Chicago, IL, for Plaintiff-Appellee.

Steven D. Pearson, Eric E. Newman (argued), Meckler, Bulger & Tilson, Chicago, IL, Daniel P. Field, Scariano, Himes & Petrarca, Waukegan, IL, for Defendants-Appellants.

Before BAUER, RIPPLE, and WOOD, Circuit Judges.

WOOD, Circuit Judge.

In September 1989, when Alejandro Dominguez was fifteen years old, he was arrested on charges of home invasion and sexual assault, based on the allegations of eighteen-year-old Lisa Kraus, who lived in the same building as he did. Dominguez was convicted and spent four years incarcerated before being paroled. Throughout this process and the period following his release, he maintained his innocence and worked to exonerate himself. With the help of a new lawyer, Dominguez eventually proved that

his DNA did not match the semen found on Kraus's underwear, and on April 26, 2002, his conviction was vacated. In August 2005, Dominguez received a pardon from the Governor.

On April 23, 2004, Dominguez filed a complaint under 42 U.S.C. § 1983 against the City of Waukegan and the police officers – in particular Officer Paul Hendley – involved in the investigation of the incident with Kraus. After the complaint was amended more than once to add parties and claims and drop parties who had died, the case went to trial with only Hendley and the City as defendants. After all evidence was submitted to the jury but before the jury rendered its verdict, the district court dismissed the City from the suit, based on a failure of proof, but with the express understanding that the City was bound to indemnify Hendley for any judgment incurred. After a ten-day trial, the jury found in favor of Dominguez and awarded him a judgment of $9,063,000, based on its finding that Hendley had violated Dominguez's right to due process by taking actions that denied him a fair trial. At that point, the City repudiated its prior position and stated that it might not indemnify Hendley, prompting Dominguez to move for post-judgment relief. Based on the City's judicial admissions on the issue of indemnification, the district court reinstated it as a defendant and amended the judgment to make Hendley and the City jointly and severally liable for the judgment in favor of Dominguez. Hendley and the City appeal, and we affirm.

I

Hendley's first argument on appeal is that Dominguez's claim is barred by the statute of limitations. We review a district court's ruling with respect to a limitations defense *de novo*. *United States v. Gibson*, 490 F.3d 604, 608 (7th Cir.2007).

In Illinois, the statute of limitations for § 1983 claims is two years. See 735 ILCS 5/13-202; *Williams v. Lampe*, 399 F.3d 867, 870 (7th Cir.2005). Dominguez filed his complaint on April 23, 2004, and so if his claim accrued on or after April 23, 2002, then his lawsuit was timely. His conviction was vacated on April 26, 2002, which falls within this window. The real question is whether that is the proper event on which to focus.

The jury was instructed to find for Dominguez if it found that the defendant caused Dominguez's criminal trial to be unfair. A § 1983 claim for a due process violation based on the denial of a fair criminal trial may be brought only after the conviction is set aside. Otherwise, that civil claim would imply the invalidity of the outstanding conviction and would thus constitute a collateral attack on the conviction through an impermissible route. *Heck v. Humphrey*, 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994). So viewed, Dominguez's claim did not accrue until 2002 and is therefore timely.

Hendley argues, however, that the underlying reason why Dominguez asserts that his trial was unfair relates to his arrest, and thus we should find

that his claim accrued no later than the time when his unlawful seizure was terminated – that is, the time of his arraignment. Fourth Amendment claims for false arrest or unlawful searches accrue at the time of (or termination of) the violation. *Wallace v. Kato,* 549 U.S. 384, 127 S.Ct. 1091, 166 L.Ed.2d 973 (2007). Even if no conviction could have been obtained in the absence of the violation, the Supreme Court has held that, unlike fair trial claims, Fourth Amendment claims as a group do not necessarily imply the invalidity of a criminal conviction, and so such claims are not suspended under the *Heck* bar to suit.

Hendley, however, is assuming that Dominguez's claim is limited to his arrest and does not also include independent charges of due process violations. That assumption overlooks critical parts of the case. Dominguez has asserted all along that the defendant officers violated his right to due process by manipulating or tampering with identification and testimonial evidence. He backed up these allegations with evidence at the trial. His due process claim is thus more than a Fourth Amendment claim by another name, and for that reason, it is not barred by the limitations rule announced in *Wallace*. Dominguez's right to sue arose only after his criminal conviction was set aside, and, as the district court held, he filed within the two years permitted by law.

II

Hendley next argues that he was entitled to qualified immunity because he did not proximately cause any constitutional violations at Dominguez's criminal trial. It is somewhat unusual to encounter a qualified immunity defense this late in the proceedings, because qualified immunity is normally raised during the pretrial phase so that the public official can avoid the burdens of trial. It is technically possible, however, to raise the defense after a jury verdict, if the immunity question itself depended on disputed issues of material fact. See *Johnson v. Jones,* 515 U.S. 304, 313, 115 S.Ct. 2151, 132 L.Ed.2d 238 (1995).

In this case, the defendants raised the defense of qualified immunity in their answer, but they did not move for summary judgment. This was a reasonable way to proceed, because Hendley denied that he had engaged in the misconduct of which Dominguez accused him: withholding material exculpatory evidence from the defense and prosecutor, orchestrating a show-up identification procedure that caused the criminal trial to be unfair, and fabricating evidence against Dominguez. There was and is no disputing that such conduct violates clearly established constitutional rights. Hendley merely hoped that the jury would credit his version of what happened rather than Dominguez's.

Hendley's biggest problem is that qualified immunity is a doctrine designed to respond to legal uncertainty, but causation (a factual matter) has

nothing to do with *legal* uncertainty. His contention about a lack of "proximate cause" is really just an assertion that the evidence was insufficient to support the jury's finding that his conduct proximately caused Dominguez's damages. Citing cases discussing proximate cause and superseding cause in § 1983 claims, Hendley asserts that "numerous circuits have held that police officers who provide truthful information to subsequent decisionmakers in the criminal justice system cannot be held liable under § 1983 for allegedly wrongful convictions." Quoting from *Townes v. City of New York,* 176 F.3d 138, 147 (2d Cir.1999), he argues that the supervening cause doctrine applies "in 'the absence of evidence that the police officer misled or pressured the official who could be expected to exercise independent judgment.'" These cases are of no help to Hendley, however, for they merely highlight the differences between those cases and Dominguez's.

Dominguez submitted sufficient evidence at trial to allow the jury to find that Hendley *did not* provide truthful information to subsequent decisionmakers, and that he *did* mislead the official who could be expected to exercise independent judgment. For example, the criminal prosecutor testified that he was never told about any showup used in Kraus's identification of Dominguez. Dominguez also proved that Hendley received an exculpatory document, known to the parties as the "Navy Report," but that this report was missing from the official file that had been provided to the prosecutor during the criminal trial, and

was not part of the materials furnished to Dominguez in discovery. The Navy Report would have provided valuable exculpatory evidence for Dominguez. After Kraus was allegedly sexually assaulted, she visited a Navy hospital and was interviewed about the incident. The account that she gave to the naval officer differed in significant ways from accounts she later gave in the investigation of the incident. Hendley denied that he arranged a showup, and denied that he had ever seen the exculpatory Navy Report. The jury therefore had to decide who was telling the truth on these points, and ultimately whether Hendley misled the prosecution and caused Dominguez to receive an unfair criminal trial. This determination had nothing to do with qualified immunity.

Hendley also argues that Dominguez has not proved that Hendley arrested him without probable cause. This would be relevant only if the verdict were based on a false arrest claim, but it was not. Even supposing Hendley did have probable cause at the time of arrest, the question is whether Hendley took actions (whether before or after the arrest) that caused Dominguez to receive an unfair trial. Probable cause at the time of arrest would not sanitize such acts.

III

The jury was instructed that, in order to find for Dominguez, it had to find that Hendley caused Dominguez's criminal trial to be unfair through any

of three specified courses of conduct: (1) withholding material, exculpatory evidence in violation of *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); (2) causing an unreliable identification procedure to be used at his trial; or (3) fabricating evidence. Hendley argues that the first of these – the *Brady* basis – should not have been submitted to the jury. He contends that Dominguez failed adequately to plead and support that theory, and also that he failed to prove it at trial. Neither point has merit.

Fundamentally, the first point overstates the importance of pleadings by the time a case reaches trial. The purpose of a complaint is to put the defendant on notice of the claim that is being asserted against him, her, or it; by the time of trial, the case has normally proceeded through discovery and the parties have provided whatever notice of their trial issues and evidence the district court ordered. This record suggests no lack of notice to Hendley or the City. They did not object to Dominguez's evidence at trial about the *Brady* violations – indeed, that evidence was a prominent part of the trial. The defense submitted evidence that materials were not withheld from the criminal prosecutor. As Dominguez points out, even if something is missing entirely from the pleadings, it can be tried by consent. See FED.R.CIV.P. 15(b) ("When an issue not raised by the pleadings is tried by the parties' express or implied consent, it must be treated in all respects as if raised in the pleadings. A party may move – at any time, even after judgment – to amend the pleadings to

conform them to the evidence and to raise an unpleaded issue. But failure to amend does not affect the result of the trial of that issue."). The record easily shows that supposed flaws in the way that Dominguez described his *Brady* point in the pleadings had no effect on the trial.

Hendley's assertion that the evidence was insufficient to support Dominguez's *Brady* theory is also unpersuasive. Once again, Hendley must show that no matter how the evidence is weighed or credited, no reasonable jury could have found by a preponderance that he withheld material exculpatory evidence from Dominguez when Dominguez was being criminally prosecuted. The trial record simply does not support such a conclusion, given Hendley's failure to disclose the showup and the Navy Report.

IV

Hendley next attacks the court's instructions to the jury. He has three complaints. First, he argues that the court erred in not giving his proposed instruction reminding the jury that Hendley may be held accountable only for conduct in which he was personally involved, not for what others did or did not do. He accuses Dominguez of trying to blur the lines by laying all responsibility at Hendley's feet, referring to "they," and characterizing the investigation as Hendley's. The district court declined to give the proposed instruction because the instruction it had already given referred only to results caused by

Hendley. The plaintiff was entitled to try to prove Hendley's responsibility for various acts, and Hendley had the opportunity to disclaim control, involvement, or responsibility and convince the jury not to find him liable.

Hendley thinks, however, that the jury remained confused on this point, and as proof he points to the question it submitted to the judge during deliberation: "If we get to the point of considering damages, do we consider the total amount of damages or do we conclude the amount of damages in light of the degree of possible wrongdoing of the defendant." At that point, Hendley renewed his request for an instruction on personal involvement, but the court decided to give the jury a proximate cause instruction.

The jury's question does not necessarily show that they were considering assigning liability to Hendley for the acts of others. It might have suggested that they were thinking of discounting his liability to take into account the actions of others. Under ordinary principles of tort law, the fact that tortfeasor A's negligent act proximately caused $100 in damages means that A is liable for the entire sum of $100, even if co-tortfeasor B could also have been liable for that same amount (with no double collection by the victim, of course). Not only does this explanation undermine Hendley's claim that his instruction was necessary to clear up confusion, it also supports the district court's decision to respond to the question by giving a proximate cause instruction.

Second, Hendley claims that the court erred by failing to instruct the jury that Hendley had no post-arrest duty to investigate. This argument is premised on Hendley's effort to characterize Dominguez's claim as exclusively based on false arrest. Because it is not, and because Dominguez presented evidence from which a jury could conclude that Hendley engaged in post-arrest conduct (like manipulation of evidence) that deprived Dominguez of a fair trial, Hendley's proposed instruction on "no post-arrest duty to investigate" was inappropriate and the district court properly rejected it.

Finally, Hendley claims that the elements instruction was erroneous because it failed to discuss superseding cause, improperly submitted the *Brady* theory, and failed to limit recovery to the period of incarceration between arrest and arraignment as contemplated by this court's decision in *Wallace v. City of Chicago,* 440 F.3d 421 (7th Cir.2006), *aff'd on other grounds sub nom. Wallace v. Kato,* 549 U.S. 384, 127 S.Ct. 1091 (2007). But the court gave a proximate cause instruction, and so Hendley was not prejudiced by the absence of an instruction discussing superseding cause. We have already explained why there was no error in the court's treatment of the *Brady* issue. Finally, with respect to the proper recovery period, the district court correctly concluded that the limitation Hendley proposed was not appropriate, since Dominguez's claim was for deprivation of a fair trial rather than false arrest. The district court did hold that damages for any unlawful seizure of Dominguez

had to be directly related to his thirteen days of detention preceding indictment, but that was prior to this court's issuance of *Wallace v. City of Chicago,* when the circuits were split on the time of accrual of Fourth Amendment claims, and certainly prior to the Supreme Court's affirmance in *Wallace v. Kato.* Thus, at the time, Dominguez's Fourth Amendment claim was still a potential theory of recovery. The district court specifically noted that its ruling "would not serve as a limitation on the admissibility of evidence as to the state law claims included in Dominguez's Complaint that are to be resolved in the same trial as his Section 1983 Fourth Amendment claim." Hendley points out that the court "failed to recognize that the only state law claims were asserted against Kraus and McCandless, both of whom had already been dismissed." The district court might inadvertently have referred to state law claims while meaning to allude to claims other than the Fourth Amendment claim, namely, the federal due process claim. In any event, the Fourth Amendment claim was eventually dismissed as time-barred and only the due process claim remained. After that, Hendley's proposed recovery-period limitation was no longer an appropriate instruction.

V

Hendley's final argument is that the cumulative effect of a number of trial errors deprived *him* of a fair trial, and thus the district court abused its discretion when it denied his motion for a new trial. We

will examine each alleged error individually; if we find two or more errors, we will assess the cumulative effect to determine whether the district court abused its discretion in not granting a new trial. See *United States v. Allen,* 269 F.3d 842, 847 (7th Cir.2001).

Each error alleged by Hendley is itself subject to the abuse of discretion standard. See *Thompson v. City of Chicago,* 472 F.3d 444, 453 (7th Cir.2006) (evidentiary rulings); *Gorlikowski v. Tolbert,* 52 F.3d 1439, 1444 (7th Cir.1995) (enforcement of a pretrial order); *United States v. Miller,* 276 F.3d 370, 373 (7th Cir.2002) (improper remarks by counsel); *United States v. Vasquez-Ruiz,* 502 F.3d 700, 704 (7th Cir.2007) (potential juror bias). Once again, he faces an uphill battle because of the standard of review.

Hendley first raises a number of complaints about things that Dominguez's lawyer did during the trial. For example, he argues that the lawyer, in his opening and closing remarks and witness examinations, misstated facts and misled the jury. First, he objects to the fact that counsel called Hendley a "bad officer." We do not believe that the district court abused its discretion in letting the remark stand. The language involved here is hardly inflammatory, and much of Dominguez's case involved trying to prove that Hendley engaged in a deliberate frame-up of Dominguez; a fleeting reference to his being a "bad officer" seems rather trivial in light of the whole record and unlikely to influence the jury if it was not otherwise inclined to credit the evidence against Hendley.

Next Hendley complains that Dominguez's counsel misled the jury by referring to "they," so as to obscure who was responsible for what actions. For example, counsel said things like "they interrogated [Dominguez]," and "they kept him there all night and deprived him of a lawyer." Hendley points out that, for example, it was Officer Marquez rather than Hendley who interviewed Dominguez. Nonetheless, we conclude that the district court did not abuse its discretion in allowing these remarks, because Dominguez was not misleading the jury if he could show that these acts were taken under Hendley's direction. The defense was free to point out who engaged in the physical acts and to refute the contention that Hendley was leading the investigation. Most importantly, the jury was instructed to find for the plaintiff only if *Hendley* caused the denial of a fair trial. The district court was entitled to take the position that this was sufficient to eliminate the risk that the jury would find Hendley liable for acts for which he had no responsibility.

In addition, Hendley believes that Dominguez's counsel confused the jury about when exactly Hendley became aware of various facts relating to Dominguez's criminal case. This argument relies on Hendley's insistence that information available only after the time of arrest is irrelevant. Once again, this flows from Hendley's refusal to acknowledge that the trial was about the deprivation of a fair criminal trial for Dominguez, not about the alleged false arrest.

Hendley also argues that questioning Mr. Carter, Dominguez's criminal defense attorney, using hypotheticals because Carter could not remember Dominguez specifically, was improper, but he cites no authority in support of this position. He also argues that Carter's claim – that Carter would have used the alleged *Brady* material to support Dominguez's criminal defense – is undermined by the fact that Carter did not use any of the documents that actually were provided. We see no error here: it was up to the jury to decide what weight, if any, to give to Carter's testimony.

Hendley's next set of arguments relates to the district court's decision to enforce the final pretrial order strictly against the defense (as he sees it), but not against the plaintiff. He points out that when the defense took issue with the fact that Dominguez did not include the *Brady* issue as a contested issue of law in the final pretrial order, the court said, "we don't need that as part of the final pretrial order"; by contrast, certain defense objections during trial were overruled because the defense had not objected to the admission of the exhibits listed on the final pretrial order. The *Brady* issue was a factual one rather than a legal one, and so we see no error there. The fact that the pretrial order form did not have the customary spaces in which to indicate an objection does not relieve a party from the duty to notify the court in a timely manner that it objects.

Hendley also asserts that the district court should not have admitted a document referred to as

the "Chancey Memo," because the memo was speculative, irrelevant, and highly prejudicial. This was a memorandum written by Matt Chancey, chief of the felony division of the Lake County State's Attorney's Office. The memo informed prosecutors that their obligation to scrutinize cases carefully was "especially true in the case of Officer Hendley because of the questions which exist about his credibility." The Chancey Memo directed those reviewing felony cases to (1) refuse to approve cases involving confessions supposedly obtained by Hendley without recorded or written confessions unless the case is prosecutable without the confession; (2) refuse to approve charges in cases where Hendley interviewed key witnesses, until the accuracy of the purported statements was verified; (3) require corroboration in any case where Hendley handled physical evidence or would be called to testify about his observations.

Naturally, this was quite prejudicial, but the question is whether it was unfairly prejudicial. The claim against the City was still alive during the trial, and this memo was relevant and highly probative for the question whether the City of Waukegan was aware that there were problems with Officer Hendley. The district court did not abuse its discretion in admitting the Chancey Memo.

Hendley claims that it was error for the district court to limit the defense's examination of the prosecutor from Dominguez's criminal case. This inquiry was important to him, he says, because the procedures followed by the prosecutor would have helped

support Hendley's defense that other actors were superseding causes of the wrongful conviction, or equivalently, that Hendley did not proximately cause it. A look at the record shows, however, that the district court was simply managing the trial appropriately. The defense's examination of this witness took up 114 trial-transcript pages, and Hendley has not shown that the district court abused its discretion in urging defense counsel to stay on track and refrain from confusing the jury.

Hendley also complains about a grab-bag of "prejudicial testimony." He objects to the amount of evidence that Dominguez's attorney elicited about Dominguez's innocence and the inadequacy of the facilities where he was detained. But this information was relevant to liability and damages, and the district court had no reason to exclude it. Hendley also objects to Dominguez's attempt to blame Hendley for the actions and omissions of others, but we have already explained why this does not accurately reflect Dominguez's purpose. Hendley also tries to find fault with the fact that Dominguez urged the jury to credit certain parts of Lisa Kraus's testimony, while painting her as a liar with regard to other matters. There is nothing improper about this. He also claims that Dominguez misled the jury by pushing the theory that Hendley should have continued investigating up to the time of Dominguez's criminal trial. But this is just another variation on Hendley's theme that any events subsequent to Dominguez's arrest are irrelevant, so long as there was probable cause at the time

of arrest. This argument lacks merit, for the reasons we have already given.

Finally, Hendley claims that the plaintiff gave an improper pretrial interview. As Dominguez notes, and Hendley does not dispute, the defense did not seek a mistrial in the court below based on this interview – it merely sought to broaden voir dire. At voir dire, it was established that no member of the venire knew about the interview, and no seated juror even watched the news channel on which the interview aired. Thus, the defense was not prejudiced by this interview, and no error occurred as a result of allowing the trial to proceed.

Finding no errors among the issues raised by Hendley, we have no occasion to assess any cumulative effect.

* * *

We AFFIRM the judgment of the district court.

United States District Court
Northern District of Illinois
Eastern Division

Alejandro Dominguez

v.

Paul Hendley

JUDGMENT IN A CIVIL CASE

Case Number: 04 C 2907

(Filed Oct. 17, 2006)

■ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury rendered its verdict.

☐ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that final judgment is entered in favor of the Plaintiff and against the defendant, Paul Hendley in the total sum of $9,063,000.00.

Michael W. Dobbins,
Clerk of Court

Date: 10/17/2006

/s/ S Newland
Sandy Newland,
Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE Northern District of Illinois –
CM/ECF LIVE, Ver 2.5
Eastern Division

S Alejandro Dominguez

Plaintiff,

v.

Paul Hendley, et al.

Defendant.

Case No.: 1:04-cv-02907
Hon. Milton I. Shadur

NOTIFICATION OF DOCKET ENTRY

(Filed Dec. 4, 2006)

This docket entry was made by the Clerk on Monday, December 4, 2006:

MINUTE entry before Judge Milton I. Shadur: Motion for leave to file crossclaim [154] is entered and continued. MOTION by Defendant Paul Hendley Combined Posttrial Motion and Memorandum of Law Renewing His Motion for Judgmetn [sic] as a Matter of Law and Alternatively, Moving for a New Trial[135]is denied. MOTION by Defendant Paul HendleyCombined Posttrial Motion and Memorandum of Law Renewing his Motion for Judgment as a Matter of Law and Alternatively, Moving for a New Trial[134]is denied. MOTION by Defendant Paul Hendley To Stay Proceedings for Execution and/or Enforcement of Judgment[132]is denied., Motion hearing held on 12/1/2006. In court notice. ttachments [sic] >(srn,)

ATTENTION: This notice is being sent pursuant to Rule 77(d) of the Federal Rules of Civil Procedure or Rule 49(c) of the Federal Rules of Criminal Procedure. It was generated by CM/ECF, the automated docketing system used to maintain the civil and criminal dockets of this District. If a minute order or other document is enclosed, please refer to it for additional information.

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

S. ALEJANDRO DOMINGUEZ, Plaintiff,	)	
v.	)	No. 04 C 2907
PAUL HENDLEY, et al., Defendants.	)	

JUDGMENT ORDER

(Filed Dec. 13, 2006)

On October 13, 2006, after the close of proofs in the jury trial in this 42 U.S.C. §1983 ("Section 1983") action but before the jury reached its verdict (that took place on October 17), this Court issued its oral ruling dismissing the City of Waukegan ("City") as a codefendant. That ruling was based on the failure of proof as to City in terms of the substantive Section 1983 claims of plaintiff S. Alejandro Dominguez ("Dominguez"), but with the express understanding – based on the representations of counsel for all the parties – that City had unconditionally undertaken to indemnify codefendant Paul Hendley ("Hendley") for any awards of compensatory damages and attorneys' fees entered against him. Indeed, here are the written confirmations of those undertakings that had been sworn to on City's behalf and signed as well by its counsel in September 2004 (part of City's Response to

Plaintiff's First Set of Requests To Admit) and that were never withdrawn or modified thereafter:

> 7. The City of Waukegan is obliged to indemnify the Responding Officers [Hendley and John Moran] for any award of compensatory damages against them at trial.
>
> ANSWER: Defendant admits the allegations of paragraph 7.
>
> 8. The City of Waukegan is obliged to indemnify the Responding Officers for any award of attorneys' fees against them at trial.
>
> ANSWER: Defendant admits the allegations of paragraph 8.

Those undertakings obviated any need for this Court (or the jury) to address Dominguez' state law claim for such indemnification as embodied in Count VII of his First Amended Complaint ("FAC"). Indeed, City had also confirmed its obligation in that respect in its Answer to the FAC – here are Paragraphs 68 and 69 of the FAC and Answer, in which City again admitted its obligation (though it denied misconduct on Hendley's part):

> 68. Illinois law provides that public entities are directed to pay any tort judgment for compensatory damages for which employees are liable within the scope of their employment activities.
>
> ANSWER: Defendants admit the allegations of paragraph 68.

> 69. Defendant Officers are or were employees of the Waukegan Police Department, who acted within the scope of their employment in committing the misconduct described herein.
>
> ANSWER: Defendants admit that the officers investigating the sexual assault of Lisa Kraus were acting within the scope of their employment and deny the remaining allegations of paragraph 69.

Now City has articulated the possibility that it is improperly repudiating its express undertaking of indemnification, which would (if successful) leave Dominguez with an uncollectible judgment against Hendley in excess of $9 million (the amount awarded in the jury verdict). That has led to a proper oral Fed. R. Civ. P. 60(b) motion by Dominguez' counsel to vacate the dismissal of City with respect to FAC Count VII (and through it with respect to Count II, the substantive Section 1983 due process of law claim). That motion is well taken, and Dominguez is entitled to the relief he seeks in that respect as a matter of law.

Accordingly, as previously stated on the record and for the reasons stated there and in this judgment order, most specifically the binding admissions and undertakings by City that it is obligated to indemnify codefendant Hendley for all compensatory damages and attorneys' fees for which he has been or will be held liable within the scope of his employment activities, the prior dismissal of City as a defendant in this

action is vacated and Dominguez' motion for judgment in his favor and against City under FAC Count VII (and through it under FAC Count II) is granted. City is ordered to be held liable as indemnitor for all sums that Hendley is obligated to pay in this litigation, including but not limited to the amount set forth in this Court's Judgment of October 17, 2006 (Doc. 131), which is attached hereto and incorporated herein. City is further ordered to be jointly and severally liable with Hendley as to all such sums, and a judgment shall be entered against it in accordance with this judgment order.

/s/ Milton I. Shadur
Milton I. Shadur
Senior United States
District Judge

Date: December 13, 2006

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

May 30, 2008

Before

WILLIAM J. BAUER, *Circuit Judge*

KENNETH F. RIPPLE, *Circuit Judge*

DIANE P. WOOD, *Circuit Judge*

S. ALEJANDRO DOMINGUEZ, Plaintiff-Appellee, Nos. 07-1004, 07-1005 and 07-3030 v. PAUL HENDLEY and CITY OF WAUKEGAN, Defendants-Appellants.	] Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.]] No. 04 C 2907]] Milton I. Shadur, Judge.

IT IS ORDERED that counsel for the appellee may file a memorandum, by June 9, 2008, addressing the cases cited for the first time at oral argument. Counsel for the appellant may file a responsive memorandum by June 19, 2008.

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

October 31, 2008

Before

WILLIAM J. BAUER, *Circuit Judge*

KENNETH F. RIPPLE, *Circuit Judge*

DIANE P. WOOD, *Circuit Judge*

Nos. 07-1004, 07-1005 & 07-3030

ALEJANDRO DOMINGUEZ, *Plaintiff-Appellee*, *v.* PAUL HENDLEY and CITY OF WAUKEGAN, *Defendants-Appellants.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 04 C 3570 **Milton I. Shadur,** *Judge.*

ORDER

On consideration of the Petition for Panel Rehearing filed by the defendants-appellants on October 14, 2008, all members of the original panel have voted to DENY the petition.

Accordingly, the petition for rehearing is hereby DENIED.

FILED
APR 6 - 2009
OFFICE OF THE CLERK
SUPREME COURT, U.S

No. 08-978

IN THE

Supreme Court of the United States

PAUL HENDLEY and THE CITY OF WAUKEGAN,

Petitioners,

v.

S. ALEJANDRO DOMINGUEZ,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether *Maryland v. Baldwin*, 112 U.S. 490 (1884), requires vacatur of a general verdict when both the district court and the court of appeals concluded that every theory of liability presented to the jury was amply supported by trial evidence.

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-18) is reported at 545 F.3d 585. The order of the district court denying petitioners' motion for judgment as a matter of law or for a new trial (Pet. App. 20-21) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 30, 2008. A petition for rehearing was denied on October 31, 2008. The petition for a writ of certiorari was filed on January 29, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

1. In 1989, respondent, then age 15, was wrongfully accused of sexual assault in Waukegan, Illinois. Petitioner Paul Hendley, a police officer for the City of Waukegan, was in charge of, and responsible for, the investigation into the alleged crime reported by the victim, Lisa Kraus. Kraus described her alleged attacker as a gang member and an English speaker, neither of which describes respondent. Tr. 190, 411, 515, 618, 632, 662, 708-09. She also gave Hendley a physical description of her attacker, which differed from respondent in height, age, clothing, and hair style. Tr. 575, 621-24, 845, 1001-02. After the security guard at the apartment complex heard rumors that respondent had been "involved in an altercation," he brought respondent to the security office as a "possible suspect." Tr. 616, 637-38.

To identify Kraus's attacker, Hendley conducted a showup procedure, which involved setting up a situation where Kraus could view respondent alone (*i.e.*, instead of as part of a lineup), and asking if he was the attacker. Kraus testified that Hendley walked her past the security office, where respondent was sitting, to "ID the person they had in custody," and that Hendley told her that her "friend had pointed him out as the one that had committed the crime." Tr. 531-32. Kraus testified that, after 40 seconds of looking at respondent, she was able to "identify" him. Tr. 554. Both before and after the showup, Hendley showed Kraus pictures of respondent, further undermining the reliability of her identification. Tr. 542-45. Hendley did not inform the prosecutor or respondent's defense team of any of the key facts surrounding Kraus's identification of respondent as her attacker. Tr. 689, 1431-32, 1444-46. Nor did he inform them of the fact of or the result of a live lineup that Hendley subsequently conducted for Kraus. Tr. 558. Most of the foregoing was not known to respondent until discovery in this civil case, many years after respondent's sentence had already been completed.

In the course of Hendley's original investigation, he uncovered a wealth of exculpatory information, all of which he also failed to disclose. Just three days before the alleged rape, Kraus reported to the Waukegan Police Department another sexual assault. Tr. 606; SR13. Although a police report would have been prepared for this complaint, no such report appears in the file or was provided to the defense. Tr. 606-07. Kraus's statement to the police that the perpetrator of the second alleged rape (the one for which respondent was convicted) lived in Apartment 309 similarly would have been exculpatory, since respon-

dent did not live or spend time in that apartment. This statement, too, is missing from the police reports, and was only discovered by respondent long after his conviction. Tr. 867-68, 1453-54. Hendley also failed to submit to the Illinois Crime Lab relevant evidence swabs that were included in the rape kit. Perhaps most compellingly, Hendley received but failed to disclose the so-called "Navy Report," which included an account that Kraus gave to a Navy hospital about the alleged rape that contradicted Kraus's later testimony. Tr. 1447. Neither the prosecution nor the defense at the criminal trial had access to these highly relevant (and exculpatory) reports. Tr. 1447-48.

At respondent's bench trial on the rape charge, Kraus's identification of respondent was the principal evidence against him. Tr. 1457-58. Although Kraus had claimed to have bitten her attacker, respondent lacked any bite marks, and lab results undermined Kraus's claim to have scratched her attacker because she had no cellular material under her fingernails. The prosecution offered the testimony of Kraus's treating doctor and a forensic serologist, who testified that evidence collected from Kraus's underwear was consistent with 1/3 of the men in the United States, including respondent. The defense presented alibi testimony, which was apparently disbelieved by the trial judge. Because the defense lacked access to any of the exculpatory evidence described above, none of that evidence was presented at trial. Respondent was convicted of criminal sexual assault. SR145.

In 2001, DNA evidence proved that respondent (by then age 27) was not Kraus's rapist, and his conviction subsequently was vacated. On August 4, 2005, the Governor granted respondent a pardon

specifically based on innocence. The State's Attorneys' Office did not object either to the vacatur of the conviction or the pardon.

2. On April 23, 2004, respondent filed a complaint under 42 U.S.C. § 1983 against the City of Waukegan and the police officers involved in the investigation of the alleged rape, including Hendley, the lead detective. The case ultimately went to trial against the City of Waukegan and Hendley alone. The sole claim submitted to the jury was that Hendley violated respondent's right to due process by subverting his criminal trial.

Respondent offered three theories in support of the claim that he was deprived of due process, and presented substantial evidence in support of each theory. Specifically, respondent offered details of the showup procedure, coupled with expert testimony--confirmed by the testimony of Hendley himself and his own expert—that a lineup should have been used instead of a showup. Tr. 314-16, 516-17, 639-40, 742-45, 833-35, 843, 1469-70, 1552. All of the witnesses (including the defense witnesses) agreed that a showup under these circumstances would be unduly suggestive, creating a risk of misidentification; the only dispute was whether Hendley had intentionally employed the suggestive procedure, which Hendley denied but Kraus confirmed. *Id.*

Respondent also offered evidence that Hendley had withheld from the prosecution and the defense the substantial, potentially exculpatory evidence detailed above.

Finally, respondent offered evidence that Hendley had manipulated evidence, preparing police reports that obscured the nature of the showup, the true circumstances of the identification, and possibly

the true nature of Kraus's identification of the driver of a TransAm relevant to the crime.

Testifying in his defense at the civil trial, Hendley denied that he had orchestrated any showup identification, and further denied that he had withheld material, exculpatory evidence or falsified his police reports.

To resolve these questions of fact, which turned in large part on witness credibility, the parties agreed on a general verdict form, which would require the jury to resolve only the single question of whether Hendley's conduct deprived respondent of due process. By agreement, the court instructed the jury to find in favor of respondent if he proved that Hendley "caus[ed] a situation where no fair trial of Dominguez could take place" in any of three ways: (1) by "us[ing] an unnecessarily suggestive identification procedure that resulted in an unreliable identification"; (2) by "creat[ing] false evidence or statements pointing to Dominguez' alleged guilt by means of improper coercion, manipulation and/or outright fabrication"; or (3) by "withh[olding] material evidence pointing to Dominguez' innocence from prosecutors, judge and defense counsel." Appellee's C.A. App. 1. No special interrogatories were sought by the defense, or given by the court.

The jury returned a verdict in favor of respondent. Hendley filed a timely post-trial motion seeking judgment as a matter of law or a new trial. In support of his argument for judgment, Hendley asserted various alleged legal defects in respondent's due process claim and also urged, in summary fashion, that respondent had insufficiently pled and supported his allegation that Hendley had withheld material exculpatory evidence. Hendley also sought

a new trial on the basis of allegedly prejudicial jury instructions and evidentiary decisions by the district court, as well as his contention that the verdict was against the weight of the evidence. The district court denied Hendley's motion in its entirety, noting that "it's frankly difficult for me to conceive[] of arguments . . . more empty in merit than those advanced here." Appellee's C.A. App. 8.

3. On appeal, now represented by new counsel, petitioners raised an array of challenges to the verdict (many of them new), including challenges to the finding of impropriety in the identification procedures, as well as to the sufficiency of the evidence supporting the allegations that Hendley had withheld and manipulated evidence. After respondent answered these arguments in his response brief, petitioners shifted course. In their reply brief, they for the first time characterized the verdict not as reflecting that the jury found at least one of three potential due process violations, but as indicating that the jury found at least one of *eleven* potential violations. C.A. Reply Br. 2, 18. Petitioners apparently reached this number by counting as a separate theory of liability each piece of evidence that respondent's counsel discussed in his closing argument as arguably having been unlawfully withheld from the defense in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). *Id.* at 19. Although Hendley had agreed on the instruction submitting the *Brady* theory to the jury and never objected to any of respondent's arguments with respect to that theory, in their reply brief to the Seventh Circuit, petitioners newly contended that seven of the nine *Brady* "theories" were insufficiently supported by evidence. Petitioners then relied on *Maryland v. Baldwin*, 112 U.S. 490 (1884), to argue that if respondent failed to prove any one of the

Brady-related allegations mentioned during the trial, petitioners would be entitled to reversal of the verdict. *See* C.A. Reply Br. 1-2, 18 (citing *Baldwin*, 112 U.S. at 490). After oral argument, the Seventh Circuit permitted respondent to reply to this new argument through supplemental briefing.

The Seventh Circuit affirmed the jury's verdict in its entirety. In so doing, the court found sufficient evidence to support the two due process theories that petitioners challenged as insufficiently supported.[1] With respect to respondent's claim that Hendley manipulated evidence, the Seventh Circuit found that "Hendley engaged in post-arrest conduct (like manipulation of evidence) that deprived Dominguez of a fair trial." Pet. App. 11; *see also id.* at 4 ("Dominguez has asserted all along that the defendant officers violated his right to due process by manipulating or tampering with identification and testimonial evidence. He backed up these allegations with evidence at the trial."). With respect to respondent's *Brady* theory, the Seventh Circuit concluded that the "trial record simply does not support" a conclusion that respondent failed to offer sufficient evidence to prove a violation of due process through a *Brady* violation, citing as examples Hendley's failure to disclose the showup and the Navy Report. Pet. App. 8-9.

Petitioners filed a petition for rehearing, focusing principally on their *Baldwin* argument. Though, but for the *Baldwin* principle, the court of appeals need not have reached petitioners' sufficiency arguments at all (because sufficiency with respect to the

---

[1] Petitioners did not assert that there was insufficient evidence to support the claim that Hendley manufactured an unduly suggestive "showup."

"showup" theory was not disputed and would have sufficed to uphold the verdict), petitioners nonetheless criticized the panel for not addressing their *Baldwin* argument explicitly. The Seventh Circuit denied the petition without discussion or noted dissent.

REASONS FOR DENYING THE PETITION

Petitioners contend that because the Seventh Circuit's opinion specifically referenced only two of the nine pieces of unlawfully withheld evidence referenced by respondent's counsel during closing argument, there must not have been sufficient evidence to support respondent's arguments with respect to the seven pieces of evidence the Seventh Circuit did not mention. Although the agreed-upon jury instructions referenced not nine distinct *Brady* theories, but a single such theory—instructing the jury to find for respondent if Officer Hendley "withheld material evidence pointing to Dominguez's innocence" (Appellee's C.A. App. 1)—petitioners argue that this Court's decision in *Baldwin* requires a reviewing court to presume that the jury evaluating that single theory of relief relied upon assertedly unsupported factual allegations of unlawful withholding of evidence rather than the allegations that were amply supported by the trial record. Even assuming that *Baldwin* imposes on reviewing courts precisely the presumption that petitioners contend—and it certainly does not—their petition would amount, at most, to an assertion that the court of appeals erred in applying this Court's clearly established precedent in a case that has no importance beyond the parties to this litigation. Even when it contributes to some disharmony in the lower courts,

such a case ordinarily does not warrant this Court's review.

For at least three reasons, however, review of this case is particularly unwarranted. First, petitioners forfeited the argument upon which they now rely by failing to raise it either in their post-verdict motions in the district court or their opening brief on appeal. Second, the *Baldwin* line of cases, which generally requires vacatur of a general verdict when the reviewing court concludes that one of the theories on which the verdict might have rested is erroneous or insufficiently supported by evidence, is not remotely implicated either by the decision of the court of appeals, which found sufficient evidence to support each of the three due process theories presented to the jury, or the trial record, which contains ample evidence to support even the arguments of counsel concerning unlawfully withheld evidence on which petitioners now belatedly stake their case. Finally, to the extent there remain open questions concerning the proper application of *Baldwin* (though petitioner's portrayal of the confusion purportedly pervading the courts of appeals is grossly overstated), this case is a particularly unsuitable vehicle for resolving those questions because it would require the Court to undertake an extensive review of the trial record and to resolve multiple threshold issues of fact in order to determine whether the *Baldwin* principle is even implicated.

A. Petitioners Forfeited Their *Baldwin* Argument By Failing To Raise It Until Their Reply Brief On Appeal

It is well-settled that this Court does not review issues that were neither raised nor decided in the court of appeals. *Clingman v. Beaver*, 544 U.S. 581,

598 (2005); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). Questions reviewed by this Court generally first require "full consideration by the courts below" in order to facilitate this Court's own consideration of those issues against a fully developed factual and legal record. *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 169 (2004).

The Question Presented by petitioners is not properly before this Court because petitioners failed to raise their *Baldwin* argument before the district court, and the argument therefore was not considered either by that court or by the Seventh Circuit, which, under circuit precedent, declines to reach arguments raised for the first time on appeal. *Boyers v. Texaco Ref. & Mktg.*, 848 F.2d 809, 811-12 (7th Cir. 1988) (quoting *Textile Banking Co. v. Rentschler*, 657 F.2d 844, 853 (7th Cir. 1981)).

In Hendley's post-trial motion, where he should properly have raised this argument to preserve it for review in the court of appeals and in this Court, he instead argued that two of respondent's three legal theories—namely, that the showup was unduly suggestive and unreliable and that Hendley violated *Brady* by withholding material exculpatory evidence—failed because respondent did not submit evidence sufficient to make a prima facie case of a due process violation, or because they were against the weight of the evidence.[2] The post-trial motion never argued that a failure of proof on the *Brady* theory alone—much less on a single factual argument in support of the *Brady* theory—required

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[2] In his post-trial motion, Hendley did not challenge the evidence in support of respondent's theory that he fabricated evidence.

vacatur of the jury verdict. Moreover, Hendley's post-trial motion did not cite *Baldwin* or any of the cases following *Baldwin* on which petitioners now rely.

As with any challenge to evidentiary sufficiency, petitioners' argument as it is now framed—that the jury was presented with insufficient evidence with respect to one or more factual averments made in support of liability, and that the jury may have relied on those assertedly unsupported averments—"calls for the judgment in the first instance of the judge who saw and heard the witnesses and has the feel of the case which no appellate printed transcript can impart." *Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 401 (2006). The district court, which denied Hendley's post-trial motion in its entirety, was given no opportunity to exercise that judgment as to petitioners' *Baldwin* argument that even a single insufficiently supported *Brady* assertion would require reversal of the entire verdict. The Seventh Circuit therefore could not properly consider petitioners' *Baldwin* argument, and nor can this Court.

Moreover, there is another, independent source of waiver. Not only did petitioners fail to raise their *Baldwin* argument before the district court, but they also failed to raise it in their opening brief filed in the court of appeals, and thus the issue was not addressed by that court. It is well-established in the Seventh Circuit that "all arguments for reversal must appear in the opening brief, so that the appellee may address them." *Estate of Phillips v. City of Milwaukee*, 123 F.3d 586, 597 (7th Cir. 1997) (citations omitted); *see also Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 100 n.5 (1991) ("We do not mean to suggest that a court of appeals should not treat an

unasserted claim as waived or that the court has no discretion to deny a party the benefit of favorable legal authorities when the party fails to comply with reasonable local rules on the timely presentation of arguments."). Yet, just like Hendley's post-verdict motion in the district court, petitioners' opening brief failed to make any mention of their *Baldwin* argument, and instead simply challenged (unsuccessfully) all of respondent's due process theories. Accordingly, the Seventh Circuit had no opportunity to resolve the *Baldwin* question raised by petitioners, and the issue therefore is not properly before this Court.

Petitioners' assertion of the *Baldwin* argument for the first time in their reply brief was insufficient to raise the issue below or to preserve the argument for review in this Court. *Clingman*, 544 U.S. at 598. Under Seventh Circuit precedent, "'[a]rguments raised for the first time in the reply brief are waived.'" *Estate of Phillips*, 123 F.3d at 597 (quoting *Wildlife Express Corp. v. Carol Wright Sales, Inc.*, 18 F.3d 502, 508 n.5 (7th Cir. 1994)). Petitioners attempted at that time to connect their belated reliance on *Baldwin* to their characterization—without citation—of respondent's brief as arguing that "the jury must have agreed with every argument and allegation of 'fact' he asserted at trial and rejected all of Appellants' defenses." C.A. Reply Br. 1. In circumstances similar to this case, however, the Seventh Circuit specifically rejects attempts by appellants to justify an entirely new argument based on the theory that the appellant was merely replying to an argument raised in the opposition brief. *Estate of Phillips*, 123 F.3d at 597 ("The [appellees'] perfunctory paragraph remarking that they thought the district court correct in disposing of the state law

claims is not enough to put those claims back into play on appeal.").[3]

In light of petitioners' clear forfeiture of the *Baldwin* argument, the Seventh Circuit's purported "fail[ure] to cite or apply the *Baldwin* principle" is not fairly characterized as the product of an "erroneous[] assum[ption] that the general verdict could stand as long as the record provided support for some of Dominguez's trial theories," Pet. 7, but rather reflects adherence to the Seventh Circuit's own well-established and entirely permissible practice of declining to consider arguments raised for the first time in a reply brief on appeal. Because the Question Presented was neither properly raised nor explicitly decided by the court of appeals, further review of that question is not appropriate.

B. The Seventh Circuit's Opinion Does Not Conflict With Any Opinion Of This Court Or Any Other Court Of Appeals

1. Petitioners claim that the decision below conflicts with a long line of decisions of this Court beginning with *Baldwin* and running through *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 459 (1993). Those cases stand for the uncontroversial proposition that a general verdict must be reversed if the reviewing court concludes that there is error in

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[3] The Seventh Circuit's authorization of supplemental briefs on the issue does not cure petitioners' waiver of their *Baldwin* argument. If anything, it proves respondent's point. The authorization of respondent to file a supplemental brief to reply to petitioners' belatedly raised *Baldwin* argument was necessary precisely because respondent's lack of an earlier opportunity to reply to that argument led to respondent citing responsive cases for the first time at oral argument.

one of the theories on which that general verdict potentially rests. Petitioners claim that the Seventh Circuit contravened this "*Baldwin* principle" in that it failed to review "each of the eleven theories [respondent] presented to the jury" and affirmed the jury verdict even though it found sufficient evidence to support only "two out of nine" *Brady* claims, and that (supposedly) no evidence existed "to support the other seven theories." Pet. 13, 14.

This characterization of the Seventh Circuit's decision rests on petitioners' mischaracterization of the trial proceedings. Respondent did not present eleven theories of liability to the jury. As the jury instructions make clear, he alleged that Hendley caused respondent's unfair trial through *three* courses of conduct: (1) improperly suggestive identification procedures; (2) fabrication of evidence; and (3) withholding material exculpatory evidence. The Seventh Circuit found evidence to support each of these three potential bases for the jury's conclusion that Hendley had violated respondent's due process rights. *See* Pet. App. 7 (orchestrating showup); *id.* at 4, 11 (manipulation of evidence); *id.* at 8-9 (failure to disclose exculpatory evidence).

In attempting to bring their case within the orbit of the *Baldwin* principle, petitioners argue that respondent's third theory of liability—that Hendley caused an unfair trial by withholding material exculpatory evidence—actually comprised nine separate theories: one for each piece of withheld evidence discussed in respondent's closing argument. This, of course, reflects a profound misunderstanding of respondent's *Brady* theory of liability. Respondent alleged not simply that Hendley had withheld particular pieces of evidence, but rather that the evidence withheld from him, in the aggregate, was so

materially exculpatory that Hendley's concealment of it denied respondent a fair trial. *E.g.*, *United States v. Bagley*, 473 U.S. 667, 682 (1985).

Indeed, petitioners' argument that respondent was required to prevail on every separate argument about every piece of allegedly withheld, allegedly exculpatory evidence is nonsensical. As the agreed-upon jury instruction properly provided, all respondent was required to prove was that there was enough evidence in the record for the jury to reasonably conclude that Hendley withheld enough *Brady* material to support a constitutional violation. Appellee's C.A. App. 1. Petitioners, however, advance a view of the *Baldwin* principle that requires not only that there be sufficient evidence to support each theory of liability on which the jury could have rested its verdict, but also that there be sufficient evidence to support each argument of counsel in support of those theories, as well as each factual averment proffered at trial to support each of those arguments.

That overly expansive view of *Baldwin* finds no support in this Court's precedents; indeed, petitioners identify no court that has ever read *Baldwin* so broadly. To the contrary, each of this Court's cases applying *Baldwin* involves a situation where the potential theories of liability were pled or specifically outlined in the jury instructions. *See*, *e.g.*, *Spectrum Sports*, 506 U.S. at 451 (reversing verdict where verdict sheet charged defendants with "monopolizing, attempting to monopolize, and/or conspiring to monopolize," and jury was erroneously instructed with respect to the requirements to prove attempted monopolization); *Wilmington Star Mining Co. v. Fulton*, 205 U.S. 60 (1907) (reversing general verdict for plaintiffs because eight acts of negligence were set

out in distinct counts, and three of those counts were unsupported by evidence).

In any event, petitioners' argument fails even on its own terms, as there was sufficient evidence to support each of the nine *Brady* examples offered by respondent at trial.

The first three examples of *Brady* material involved the withholding of evidence related to Kraus's showup identification of respondent; specifically, Kraus testified in support of respondent's claims (1) that Hendley withheld from respondent information that Kraus was shown a photograph of respondent *before* the showup; (2) that Hendley withheld information that Kraus's "identification" was improperly reinforced when she was shown a photograph of respondent *after* the showup; and (3) that Hendley withheld information about the nature of the showup itself, including that the identification was an arranged procedure rather than being spontaneous. *See* Appellee's C.A. Br. 22-24. Even when they finally advanced their *Baldwin* argument in their reply brief in the court of appeals, petitioners did not dispute that there was sufficient evidence—*e.g.*, Kraus's testimony—to support these assertions.

The next four pieces of exculpatory evidence referenced by respondent's counsel were police reports from the Waukegan Police Department either withheld by Hendley from the defense or not completed so as to prevent the disclosure of exculpatory information. Appellee's C.A. Br. 24-26 (citing trial evidence). One of these reports recounted Kraus's allegations of another sexual assault just three days before the sexual assault for which respondent was convicted. A Navy investigator testified that Hendley had told him about the previous allegation of sexual assault,

and Hendley agreed that such an allegation would normally give rise to a report. Another missing police report included the information Hendley discovered about Apartment 309, where Kraus claimed the perpetrators lived, and to which respondent had no connection. Hendley never documented this information. Other missing police reports included one reflecting an interview with Steve Sharp, a friend of Kraus's, and one reflecting an interview with Rich McCandless, the apartment security guard. Appellants' C.A. Br. 29-30.

The eighth *Brady* violation referenced by counsel was Hendley's failure to tell respondent of the exculpatory results of a live lineup that Hendley arranged. Although Hendley denied it at trial, Kraus testified to the existence of this lineup. Appellants' C.A. Br. 30; Appellee's C.A. Br. 26. And finally, there was Hendley's failure to submit certain missing evidence to the Illinois Crime Lab; the Crime Lab testified that this evidence was never provided, and Hendley was the person responsible for producing the evidence. *Id.* at 27.[4]

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[4] With respect to the missing Crime Lab evidence, petitioners continue to rely on evidence that is not even in the record. Indeed, the district court repeatedly denied petitioners' requests to supplement the appellate record to include this evidence. *See* C.A. Rule to Show Cause Exs. A-C. Petitioners' persistent requests to supplement the record elicited a strong rebuke from the district court judge, who remarked that "I have never seen anything quite like this, and I have been at this trade a long time." *Id.* Ex. D; *see also id.* ("And I still haven't heard an answer to the question of when the Court orders you to do something [compile the record for transmittal without including evidence that the court declined to certify], you have the gall to say, 'We won't do it.' . . . You have got a responsibility to the court. How can you come in and say, 'Judge, we are going to

There thus was adequate evidence to support each of the nine alleged *Brady* violations highlighted by respondent's counsel in his closing argument in support of respondent's single *Brady* claim. When coupled with Hendley's failure, noted by the Seventh Circuit (Pet. App. 8-9), to produce the so-called Navy Report, which recounted several potentially exculpatory statements made by Kraus at the Navy hospital after the alleged assault, it amounts to an undeniably compelling case that Hendley's withholding of evidence denied respondent a fair trial. Because respondent's *Brady* theory of liability—whether viewed as a single unitary theory, or even as nine separate theories for that matter—was well-supported by the evidence adduced at trial, the Seventh Circuit's affirmance of the jury verdict did not implicate, much less conflict with, *Baldwin*.

2. Nor does the decision below conflict with any decision of any other court of appeals. In fact, petitioners do not even assert the existence of such a conflict, arguing instead that this Court's review is warranted to resolve what they characterize as the Seventh Circuit's "internally inconsistent" approach to the *Baldwin* principle, and to resolve the approaches of other courts of appeals that, "just like the Seventh Circuit," have supposedly developed approaches that also are "internally inconsistent." Pet.

[Footnote continued from previous page]
thumb our nose at you?'"). Notwithstanding the district court's explicit refusal to supplement the record, petitioners proceeded to rely on that extra-record evidence in their appellate brief in an attempt to respond to one of the arguments in support of the *Brady* claim. *Id.* The petition for certiorari repeats the same argument, without acknowledging that the district court denied petitioners' motion to supplement the record with this evidence.

15, 19-20. Of course, this Court does not often grant certiorari to resolve intra-circuit conflicts; that is the job of courts of appeals sitting en banc. But, regardless, the approaches developed by the courts of appeals are not nearly as "internally inconsistent" as petitioners suggest.

The courts of appeals agree, as they must, that *Baldwin* is the governing law, and generally apply its rule. At least eight of the courts of appeals recognize the *Baldwin* principle, but apply a harmless error exception.[5] Petitioners claim that the cases that apply a harmless error exception are in conflict with cases that invoke the *Baldwin* principle without stating explicitly whether a harmless error exception exists. If this wrinkle in the case law reflected an inconsistency in the application of *Baldwin*, it would be of no consequence in this case since the court below did not need to resort to harmless error analysis. But, in fact, petitioners' claim of widespread intra-circuit conflicts between cases that follow *Baldwin* and those that apply a harmless error standard is greatly exaggerated. The two sets of cases are easily reconcilable. In many of the cases that petitioners

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[5] *See, e.g.*, *Muth v. Ford Motor Co.*, 461 F.3d 557, 564-65 (5th Cir. 2006); *Henderson v. Winston*, No. 94-2071, 1995 WL 378602 (4th Cir. June 27, 1995); *Davis v. Rennie*, 264 F.3d 86, 105 (1st Cir. 2001); *Bruneau v. South Kortright Cent. Sch. Dist.*, 163 F.3d 749, 759-60 (2d Cir. 1998); *Hurley v. Atl. City Police Dep't*, 174 F.3d 95, 121 (3d Cir. 1999); *Mueller v. Hubbard Milling Co.*, 573 F.2d 1029, 1039 (8th Cir. 1978); *Traver v. Meshriy*, 627 F.2d 934, 938-39 (9th Cir. 1980) (Kennedy, J.) (applying a multi-factor test to determine when a reviewing court may properly construe a general verdict as attributable to a properly submitted theory); *Collum v. Butler*, 421 F.2d 1257, 1260 (7th Cir. 1970).

claim "applied *Baldwin* correctly," the error is plainly not harmless, or for some other reason the issue is simply not addressed. *See, e.g.*, *Lawndale Nat'l Bank v. Am. Cas. Co.*, 489 F.2d 1384, 1388 (7th Cir. 1973) (reversing a judgment for the defendant insurer, which presented substantial evidence in support of two independent defenses to liability, one of which was prohibited by state law). As a result, these decisions do not involve, and therefore do not mention, the harmless error exception. Tellingly, petitioners cannot point to a single decision that expressly *rejects* such an exception as impermissible under *Baldwin*.

Nor is application of a harmless error exception inconsistent with *Baldwin* or this Court's subsequent cases. This Court's early cases pre-date the emergence of harmless error as a generally accepted form of review, and thus do not consider the topic. However, this Court's decision in *Wilmington Star* specifically provides that reversal of a general verdict is appropriate only *"where it is impossible* from the record to say upon which of the counts of the declaration the verdict was based." 205 U.S. at 79 (emphasis added). As the First Circuit has noted, "[t]he harmless error approach addresses this concern by requiring reversal unless the reviewing court concludes that it is 'reasonably certain that the jury was not significantly influenced by issues erroneously submitted to it.'" *Davis v. Rennie*, 264 F.3d 86, 105 (1st Cir. 2001) (quoting *E.I. du Pont de Nemours & Co. v. Berkley & Co.*, 620 F.2d 1247, 1258 n.8 (8th Cir. 1980)); *see also Hurley v. Atl. City Police Dep't*, 174 F.3d 95, 121 (3d Cir. 1998) ("It has long been acknowledged, however, that *Baldwin* does not speak to the harmless error situation.").

The only cases to which petitioners point that deviate from the well-established approach of applying the *Baldwin* rule in conjunction with some form of harmless error analysis, adopted by at least eight circuits, are a handful of mostly older Seventh Circuit cases that suggest that a general verdict should be sustained if there is adequate evidentiary support for any valid theory of liability considered by the jury. But a single court's aberrational deviations from a generally accepted approach to the application of this Court's precedents typically do not warrant this Court's review. This is particularly so when at least seven other circuits besides the Seventh Circuit have decided cases that set forth the established rule, no circuit has rejected that rule, and the decision below is entirely consistent with it. And this may explain why this Court has denied at least six requests to reexamine the application of *Baldwin*, even in cases where, unlike here, the *Baldwin* rule actually was implicated.[6]

And, in fact, even the Seventh Circuit's past departures from the *Baldwin* rule are blown out of all proportion by petitioners. The Seventh Circuit has repeatedly applied *Baldwin* in a manner consistent with the generally accepted approach. *See, e.g.*, *Lawndale Nat'l Bank*, 489 F.2d at 1388 (applying the general *Baldwin* rule); *Dawson v. N.Y. Life Ins. Co.*,

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[6] *See Regions Bank v. BMW N. Am., Inc.*, No. 05-375 (cert. denied Nov. 28, 2005); *Union Pac. R.R. Co. v. Barber*, No. 04-47 (cert. denied Oct. 12, 2004); *Mitsubishi Elec. Corp. v. Ampex Corp.*, No. 99-1287 (cert. denied Apr. 3, 2000); *Atl. City Police Dep't v. Hurley*, No. 99-431 (cert. denied Jan. 10, 2000); *Ernst & Young LLP v. Knapp*, No. 96-886 (cert. denied Feb. 18, 1997); *Transp. Ins. Brokers, Inc. v. D.W. Ferguson & Assocs.*, No. 94-2113 (cert. denied Oct. 2, 1995).

135 F.3d 1158 (7th Cir. 1998) (same); *Simmons, Inc. v. Pinkerton's, Inc.*, 762 F.2d 591, 597, 599 n.3 (7th Cir. 1985) (applying harmless error exception to *Baldwin* principle). The only remotely recent case on which petitioners rely—*Kossman v. Northeast Illinois Regional Commuter Railroad Corp.*, 211 F.3d 1031, 1037 (7th Cir. 2000)—implies that the defendant's failure to request a special verdict may be the cause of the alteration of the usual *Baldwin* rule. Indeed, the Ninth Circuit and Federal Circuit have expressly held that such conduct forfeits the right to complain of the opacity of a general verdict. *See McCord v. Maguire*, 873 F.2d 1271, 1274 (9th Cir. 1989); *Mitsubishi Elec. Corp. v. Ampex Corp.*, 190 F.3d 1300 (Fed. Cir. 1999). *Kossman* accordingly is not inconsistent with *Baldwin*, but instead offers yet another possible exception fully reconcilable with *Baldwin*, and because petitioners specifically agreed to the disjunctive jury instruction and the general verdict rendered here, this exception would be fatal to petitioners' argument as well (assuming that this case presented any legitimate *Baldwin* issue, which, as detailed above, it does not).

C. This Case Presents An Unusually Poor Vehicle For A Reexamination Of The *Baldwin* Principle

Finally, even assuming for the sake of argument that review were warranted in an appropriate case to consider the interpretation of *Baldwin*, this case is a particularly poor vehicle for that consideration.

1. Perhaps most notably, the court of appeals did not even explicitly address petitioners' argument, which, as noted *supra* at 9-13, was forfeited. This Court has observed that "prudence" counsels declining to "decid[e] in the first instance an issue on

which the trial and appellate courts did not focus," which may be better evaluated by the lower courts. *United States v. Bestfoods*, 524 U.S. 51, 71-72 (1998); *see also Lab. Corp. of Am. Holdings v. Metabolite Labs.*, 548 U.S. 124, 132-33 (2006) (Breyer, J., dissenting) (dissenting from the Court's dismissal of a writ of certiorari as improvidently granted, but noting in support of the majority decision the "practical reason" that the court below had "not directly consider[ed] the question" and that "[l]ower court consideration almost always helps" the Court "reach a better decision").

Even beyond the lack of a lower court opinion explicitly addressing the issue, however, this case would require extensive review of petitioners' sufficiency-of-the-evidence arguments before this Court could even begin to address any question regarding the interpretation of *Baldwin*. *Baldwin* and its progeny apply to a particular type of case: one in which a reviewing court finds error in one or more theories potentially supporting a general verdict. This is not such a case. Neither the district court in its ruling on Hendley's post-trial motion, nor the court of appeals, even implied—much less concluded—that error was present in *any* of respondent's three theories of liability. Instead, as noted above, the Seventh Circuit specifically acknowledged and affirmed the district court's finding that respondent "backed up [his] allegations with evidence at trial" and that he "submitted sufficient evidence at trial to allow the jury to find that Hendley *did not* provide truthful information to subsequent decision makers, and that he *did* mislead the official who could be expected to exercise independent judgment." Pet. App. 4, 6.

In order to reach the question of whether *Baldwin* nonetheless required relief in this case, this Court first would need to reexamine the trial evidence considered by the district court and the court of appeals to determine whether those courts erred in concluding that respondent presented sufficient evidence on each of his three due process theories. Given the generous interpretation that must be given to evidence in support of a jury verdict in deciding a sufficiency challenge, and the finding of the court of appeals that the evidence was sufficient, as well as the considerable deference due those determinations, there is virtually no possibility that this review of the record would ultimately result in a determination that this Court could reach the *Baldwin* question. Additionally, the Court would have to consider the substantial threshold question of whether and when statements made in a closing argument amount to independent bases of liability that, under petitioners' proposed expansion of *Baldwin*, must each be legally sound and supported by sufficient evidence. Unless the Court could surmount both of these threshold issues, its decision could consider only the factbound question of whether respondent here presented enough evidence to warrant a verdict in his favor, a question that would have no importance beyond the context of this case.

2. Even if this Court were to overcome these issues and reach the question of whether *Baldwin* was followed by the Seventh Circuit in this case, it is unlikely that any decision of this Court would result in a different ultimate outcome. As noted above, the courts of appeals generally agree that *Baldwin* challenges, like the vast majority of challenges to a judgment, are limited by harmless error review. If this Court adopted this approach, any lack of evi-

dence in support of one of the grounds for the general verdict would likely be found to be harmless error.

The courts of appeals are often able to uphold verdicts by resort to harmless error standards when the error involved is that a claim was submitted to the jury when supported by insufficient evidence. *See, e.g., Gillespie v. Sears, Roebuck & Co.*, 386 F.3d 21, 30 (1st Cir. 2004) ("Recognizing that a jury is likely to prefer a better supported theory to one less supported, we have generously applied the harmless error concept to rescue verdicts where we could be *reasonably sure* that the jury in fact relied upon a theory with adequate evidentiary support."); *Braun v. Flynt*, 731 F.2d 1205, 1206 (5th Cir. 1984) (applying harmless error to uphold verdict where there was "little if any evidence" in support of one theory, rendering court "reasonably certain" that the jury did not base its verdict on that theory).

Here, both the district court and the Seventh Circuit concluded that the evidence was sufficient on each theory advanced by respondent. Even if this Court's review of this evidence somehow led it to disagree, the Court would be likely to determine that this error was harmless, given the substantial evidence on respondent's other theories. Indeed, petitioners did not even challenge the sufficiency of the evidence with respect to respondent's claim that Hendley orchestrated an unduly suggestive showup identification. In light of the substantial and unquestioned evidence on these theories of liability, this Court could comfortably conclude to a reasonable certainty that, if the evidence on certain *Brady* theories was insufficient to support a verdict, the jury relied on an appropriately supported theory.

In short, if the Court granted review of this case, it would be required to resolve substantial threshold, factbound issues, and then required to apply *Baldwin* without the benefit of a decision from any lower court on that issue. Moreover, the Court's decision would be unlikely to change the ultimate outcome of the case. These circumstances mark this case as a uniquely poor vehicle for consideration of any questions surrounding the proper interpretation of *Baldwin*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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